DEC 3 1999

No. 98-1167

In the Supreme Court of the United States

EDWARD CHRISTENSEN, ET AL., PETITIONERS

v.

HARRIS COUNTY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record

EDWIN S. KNEEDLER
Deputy Solicitor General

JONATHAN E. NUECHTERLEIN
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HENRY L. SOLANO
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 207(*o*), may, absent a preexisting agreement, require its employees to use accrued compensatory time.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 98-1167

EDWARD CHRISTENSEN, ET AL., PETITIONERS

v.

HARRIS COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Secretary of Labor is responsible for implementing and enforcing the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* See, *e.g.*, 29 U.S.C. 216(c) and (e). As discussed in this brief, the Department of Labor has issued regulations and opinion letters relevant to the question presented here, and the United States has a substantial interest in the correct resolution of that question. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. The Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, generally requires covered employ-

ers to pay their employees a minimum wage and to compensate overtime work at a rate of one and one-half times the employees' regular rate of pay. 29 U.S.C. 206, 207. Public agencies, including federal agencies and state and local governments, are subject to the FLSA. 29 U.S.C. 203(d), (s)(1)(C) and (x). This Court has held that, under its power to regulate interstate commerce, Congress has validly applied the FLSA's minimum wage and overtime provisions to state and local governments. See *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), which in turn had overruled *Maryland* v. *Wirtz*, 392 U.S. 183 (1968)).[1]

In 1985, in response to *Garcia*, Congress amended the FLSA to give state and local governments limited temporary relief from liability and to address certain additional concerns raised by public agencies. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §§ 2-7, 99 Stat. 787-791. One of the 1985 amendments, codified at 29 U.S.C. 207(*o*), permits employees of state and local governments to receive, "in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required." 29 U.S.C. 207(*o*)(1).

---

[1] In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court held that Congress lacks the power under the Commerce Clause to abrogate a State's sovereign immunity from suit in federal court. In *Alden* v. *Maine*, 119 S. Ct. 2240 (1999), the Court held that sovereign immunity also protects a State from FLSA suits for money damages by private parties in state court. State sovereign immunity, however, "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden*, 119 S. Ct. at 2267. Respondent Harris County has not argued that it is immune from suit in this case.

The Act attaches two conditions to the provision of compensatory time in lieu of overtime compensation. Congress specified that a public agency may provide compensatory time "only —

> (A) pursuant to—
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and
>
> (B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

29 U.S.C. 207(*o*)(2). In short, Congress specified that a public agency may award compensatory time (as opposed to overtime pay) *only* if it first secures an "agreement" or "understanding" to that effect with the affected employees, and only then if those employees have not individually exceeded the statutory limit on the hours of compensatory time they may accumulate. The applicable limit is 480 hours for "work in a public safety activity, an emergency response activity, or a seasonal activity," and 240 hours for any other work. 29 U.S.C. 207(*o*)(3)(A). An employee who reaches the applicable limit "shall, for additional overtime hours of work, be paid overtime compensation." *Ibid.*

If an employer chooses to reduce an employee's accrued compensatory time by paying for it, payment must be "at the regular rate earned by the employee at the time the employee receives such payment." 29

U.S.C. 207(*o*)(3)(B). An employee with accrued compensatory time is also entitled to be paid for it at specified rates upon termination of employment. 29 U.S.C. 207(*o*)(4). Finally, an employee who asks to use accrued compensatory time "shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. 207(*o*)(5).

b. The 1985 amendments direct the Secretary of Labor to "promulgate such regulations as may be required to implement [the] amendments." Pub. L. No. 99-150, § 6, 99 Stat. 790 (29 U.S.C. 203 note). The Secretary complied with that directive with respect to compensatory time by issuing the regulations codified at 29 C.F.R. 553.20-553.28. The regulations contemplate that compensatory time agreements may include "provisions governing the preservation, use, or cashing out of compensatory time." 29 C.F.R. 553.23(a)(2). Such provisions are valid so long as they are "consistent with section [207(*o*)]." *Ibid.* Otherwise, they are "superseded" by the statute. *Ibid.*[2]

The regulations further specify the circumstances under which a public agency will be found to have entered into a valid "agreement" or "understanding" with its employees concerning compensatory time. When employees do not have a recognized representative, an agreement or understanding with an

[2] For employees subject to Section 207(*o*)(2)(A)(ii) who were hired before April 15, 1986, "the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding." 29 U.S.C. 207(*o*)(2). For such employees, that "regular practice" must also conform to the provisions of Section 207(*o*). 29 C.F.R. 553.23(c)(2).

individual employee may "take the form of an express condition of employment," provided that the employee "knowingly and voluntarily agrees to it as a condition of employment" and is informed "that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section [207(*o*)]." 29 C.F.R. 553.23(c)(1). Moreover, "[a]n agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay," and such an agreement is "presumed to exist" with "any employee who fails to express to the employer an unwillingness to accept compensatory time," so long as the employee's acquiescence is free and uncoerced. *Ibid.*

2. a. Petitioners are deputy sheriffs employed by respondent Harris County, Texas. The County has individual agreements with petitioners under which they receive compensatory time for their overtime work. Pet. App. 29a-31a; *Moreau* v. *Klevenhagen*, 508 U.S. 22 (1993) (discussing Harris County arrangements). The premise of this Court's decision to grant certiorari is that those agreements (which are not in the record) are silent on whether the County may require petitioners to use their accrued compensatory time against their will. See note 4, *infra*; see also Pet. App. 12a.

In 1992, the County asked the Department of Labor for guidance on whether, consistent with the FLSA, it could adopt such a required-use policy. The Department responded:

> [A] public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed *if* the prior agreement *specifically* provides such a provision, and the employees have

> knowingly and voluntarily agreed to such provision freely and without coercion or pressure. See [29 C.F.R.] § 553.23(c). Absent such an agreement, it is our position that neither the statute nor the regulations permit an employer to *require* an employee to use accrued compensatory time.

Opinion Letter from Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), *available in* 1992 WL 845100 (paragraph break omitted). The County Sheriff's Department nonetheless applies a required-use policy, which the parties to this case have summarized in a stipulation. See Pet. App. 29a-31a. Under that policy, "each Bureau Commander determines the maximum number of compensatory hours that may be maintained by employees in his or her bureau," based on "an assessment of the personnel requirements of the particular bureau." *Id.* at 29a-30a. Once an employee approaches the statutory maximum number of accrued hours, the employee "is requested to voluntarily take steps to begin reducing the number of accumulated compensatory hours." *Id.* at 30a. If the employee does not take steps to do so within a reasonable period, his or her supervisor "is authorized to order" the employee to reduce that number. *Ibid.* Although the Sheriff's Department tries to arrange mutually agreeable times for the employee to use the accumulated time, if no agreement is reached the supervisor may "direct[ ] the employee to utilize compensatory time at a time or times that will best serve the personnel requirements of the bureau." *Ibid.*

b. In April 1994, petitioners filed a class action against the County and its Sheriff, alleging that respondents had violated Section 207(*o*) of the FLSA by, among other things, forcing petitioners to use their

compensatory time when they did not wish to do so. Pet. 4-5; see Pet. App. 3a.[3] In November 1996, the district court granted summary judgment to petitioners. Pet. App. 24a-27a. Following *Heaton* v. *Moore*, 43 F.3d 1176 (8th Cir. 1994), cert. denied, 515 U.S. 1104 (1995), the court reasoned that, under Section 207(*o*), compensatory "time off must be consumable by the worker on the worker's terms." Pet. App. 25a.

The court of appeals reversed. Pet. App. 1a-23a. After surveying the statutory scheme, the court concluded that the FLSA does not address whether, in the absence of a specific agreement on the issue, a public agency may require its employees to use compensatory time. *Id.* at 10a. The court observed that the question is squarely presented here, because the parties had not identified any relevant agreement governing the use of accrued compensatory time. *Id.* at 12a. Declining to speculate how Congress might have legislated had it considered the issue, the court decided to "devis[e] [its] own solution." *Id.* at 10a. It adopted a "default rule" that, unless the parties have specified otherwise, an employer may require its employees to use accrued compensatory time against their will. See *id.* at 10a-13a. That "default rule," the Court reasoned, is an appropriate application of "the general principle that the employer can set workplace rules in the absence of a negotiated agreement to the contrary." *Id.* at 13a.

---

[3] Petitioners raised, but ultimately abandoned, several other claims. The court of appeals concluded that it had appellate jurisdiction over this case even though the district court had not specifically ruled on those abandoned claims. As noted in our brief at the petition stage (at 6 n.4), the parties have not questioned that conclusion.

Judge Dennis dissented. Pet. App. 14a-23a. He agreed with the majority that the FLSA does not answer the question presented here, but he concluded that the Secretary of Labor's regulations do effectively answer that question in petitioners' favor and that the Secretary's position is entitled to deference. *Id.* at 18a. Judge Dennis would have remanded, however, for further factual development concerning whether or not the parties had entered into a lawful agreement specifically addressing the required-use issue. *Id.* at 19a-20a.

SUMMARY OF ARGUMENT

Federal law comprehensively governs any agreement between public employers and their employees on the subject of compensatory time. The question presented here is whether, when an employer and its employees agree to the provision of compensatory time in lieu of overtime pay as a general matter but do not specifically address the question of the employees' preservation and use of that time, the employer may require the employees to use the time against their wishes. The court of appeals answered that question in the employer's favor, reasoning that, in the absence of language in the agreement to the contrary, an employer has inherent authority to prescribe the rules for compensatory time, just as it has inherent authority to set the other conditions of employment.

That reasoning is unsound. By virtue of the FLSA, any authority an employer might have to adopt a compensatory time program now derives solely from the voluntary agreement of employees, not from any inherent power of the employer to prescribe the terms of employment. If employees withhold agreement, they retain an undisputed right to premium pay rather than compensatory time. Because any compensatory time

arrangement is a product of employee consent, it makes little sense to decide the question presented here against the interests of those without whose consent there would be no compensatory time program to begin with. Accordingly, where an agreement does not grant the employer control over the manner in which compensatory time will be used, the proper conclusion to be drawn from that silence is that the employees' compensatory time is generally theirs to use as they like, just as their overtime pay would have been theirs to spend as they liked had they refused compensatory time altogether.

That conclusion is correct even though, as a consequence, some employees may accrue so much compensatory time that they might someday reach the statutory maximum, beyond which additional overtime would have to be compensated in wages. Congress designated overtime pay as the preferred payment option in the absence of a contrary agreement, and it therefore entitled employees, if they so choose, to receive such pay for *all* of their overtime. An employee's greater power to reject compensatory time altogether includes a lesser power to agree to compensatory time subject to the possibility that, by operation of the FLSA, *some* overtime may someday need to be compensated in the form of wages.

The approach we advocate here would not impose a substantial prospective burden on public employers. Under *any* approach, an employer wishing to institute a compensatory-time program must first obtain the agreement of its employees; by regulation, many such agreements can be quite informal. Employers are well situated, at the same time they reach such an agreement, to seek to ensure that it specifically reflects any policy concerning the preservation and use of com-

pensatory time. To be sure, some employees who would agree to the substitution of compensatory time for overtime compensation might not wish to cede control over their use of that time. But their exercise of that choice would not leave employers worse off than if the employees had simply withheld consent to a compensatory-time arrangement to begin with. In the long term, our answer to the question presented here could disadvantage employers only in the sense that employees would make better informed decisions about the compensatory-time arrangements to which they have been asked to agree.

Finally, this Court does not write on a blank slate. The Secretary of Labor, in whom Congress has vested responsibility for implementation of Section 207(*o*), has addressed the question presented here and has answered it in favor of the affected employees. The Secretary's considered position is entitled to substantial deference. See *Auer* v. *Robbins*, 519 U.S. 452, 457, 461-463 (1997).

ARGUMENT

UNDER THE FLSA, A PUBLIC EMPLOYER MAY NOT REQUIRE AN EMPLOYEE TO USE ACCRUED COMPENSATORY TIME ABSENT A PREEXISTING AGREEMENT ON THE ISSUE

In holding that public agencies may unilaterally prescribe the terms on which their employees must use their compensatory time, the court of appeals invoked, as its "default rule," a "general principle that the employer can set workplace rules in the absence of a negotiated agreement to the contrary." Pet. App. 13a. The court thus treated compensatory time as it might have treated holiday bonuses: in the court's view, so

long as no law or agreement directly forecloses a particular employment policy, an employer is free to adopt it. That approach might be appropriate if public agencies could base their authority to develop compensatory-time programs, like their authority to award holiday bonuses, on their inherent powers as employers to set the conditions of employment. Under the FLSA, however, whatever authority a public agency now has to adopt a compensatory-time program rests not on such inherent powers, but on the voluntary "agreement" of its employees to be subject to that program. As the Secretary of Labor has reasonably determined, the conclusion to be drawn from an agreement's silence on the question presented here should be resolved in favor of the employees without whose consent there would be no agreement, and no compensatory-time program, at all.

1. The FLSA establishes a general rule that an employer must pay its employees a cash premium for their overtime hours. The 1985 Amendments make a conditional exception to that rule for public agencies, but the conditions to that exception are crucial. In particular, the 1985 Amendments do *not* grant public agencies a unilateral right to provide compensatory time instead of overtime compensation to nonconsenting employees. Instead, they permit each public agency to seek an "agreement" or "understanding" with its employees—that is, a meeting of minds—on the subject of compensatory time. See p. 3, *supra*; *Black's Law Dictionary* 62, 1369 (5th ed. 1979). In the *absence* of such an agreement, a public agency has no authority whatsoever to adopt a compensatory-time program, and the agency must instead follow the rule applicable to all other employers covered by the FLSA: it must pay monetary compensation, at the premium rate, for

overtime. Any compensatory-time program is thus the product of employee consent. See *Moreau* v. *Klevenhagen*, 508 U.S. 22, 34 n.16 (1993); see also S. Rep. No. 159, 99th Cong., 1st Sess. 10-11 (1985); H.R. Rep. No. 331, 99th Cong., 1st Sess. 18 (1985).

The FLSA anticipates, and the Secretary of Labor's implementing regulations expressly provide, that compensatory time "agreements" will often be comprehensive in scope, encompassing not just a yes or no decision on whether compensatory time will be permitted at all, but also subsidiary provisions "governing the preservation, use, or cashing out of compensatory time." 29 C.F.R. 553.23(a)(2); accord S. Rep. No. 159, *supra*, at 11 (same); H.R. Rep. No. 331, *supra*, at 20 (same). An employer's authority to require employees to use their compensatory time when they would rather preserve it ranks among the most important issues concerning the "preservation" and "use" of compensatory time. The question presented in this case, which is integral to the implementation of this federal statutory scheme, is what to do when the parties have left that issue unaddressed in their agreement.[4]

That question should be answered in favor of the affected employees, as the Department of Labor has previously determined. See Opinion Letter from Wage

[4] This Court granted certiorari to address whether a public agency may require employees to use their accrued compensatory time "absent a preexisting agreement" permitting such compulsion. 120 S. Ct. 320 (1999); see also Pet. i (question presented); Pet. App. 12a-13a (deciding case on premise that parties had no agreement on that issue). As we observed in our amicus brief at the petition stage (at 18 n.12), respondents did not contend in their brief in opposition that the parties had in fact entered into any agreement that addresses this issue, and any such contention would now be waived. See Sup. Ct. R. 15.2.

& Hour Div., Dep't of Labor (Sept. 14, 1992), *available in* 1992 WL 845100 (discussed at pp. 5-6, *supra*); accord Br. of Sec'y of Labor as Amicus Curiae at 6-11, *Local 889, AFSCME* v. *Louisiana*, 145 F.3d 280 (5th Cir. 1998) (same). That conclusion is the natural consequence of Congress's decision to give employees the right to consent—or to withhold consent—to any substitution of compensatory time for overtime pay. When employees give up their right to premium pay, the proper inference from silence is that they will have broad discretion to use or preserve it as they wish, just as they would have enjoyed the right to save or spend their overtime pay as they wished had they not agreed to compensatory time to begin with.[5]

[5] See *Heaton*, 43 F.3d at 1180; see also 29 C.F.R. 531.35 ("wages" under FLSA must be "paid finally and unconditionally or 'free and clear'"); H.R. Rep. No. 331, *supra*, at 23 ("Clearly, compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting that obligation."); S. Rep. No. 159, *supra*, at 10 (compensatory time is provided "in lieu of monetary compensation" and must be at the premium rate, "just as the monetary rate for overtime is calculated at the premium rate"). The Secretary recently returned to this issue in rejecting a regulatory proposal that would have given an employer a unilateral right to substitute an employee's accrued compensatory time for the employee's unpaid leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* The Secretary reasoned that, under the FLSA, compensatory time is "not a benefit provided by the employer. Rather, it is an alternative for paying public employees * * * for overtime hours worked. The public employee's 'comp time bank' is not the property of the employer to control, but rather belongs to the employee." 60 Fed. Reg. 2180, 2206-2207 (1995). Moreover, the Secretary noted, permitting an employer "to unilaterally *require* substitution would conflict with FLSA's rules on public employees' use of comp time only pursuant to an agreement or understanding * * * reached *before* the performance of the work." *Id.* at 2207.

That is so even though preserving employee discretion over the use of compensatory time could ultimately result in the employer's having to pay overtime compensation when it would have preferred to provide compensatory time, if the employee concerned reaches the statutory maximum number of compensatory-time hours that can be accrued. See 29 U.S.C. 207(*o*)(3)(A). Congress made employee consent a precondition to any compensatory time policy precisely because it recognized that many employees would prefer cash to compensatory time, and it therefore prescribed cash, rather than compensatory time, as the default payment option in the absence of a relevant agreement. Respondents' position would turn that statutory policy on its head, relying on the potential for cash payments (if and when the statutory maximum is reached) as an affirmative reason for divesting employees of control over their own compensatory time. See *Collins* v. *Lobdell*, 188 F.3d 1124, 1129-1130 (9th Cir. 1999), petitions for cert. pending, No. 99-592 (filed Oct. 5, 1999), and No. 99-788 (filed Nov. 5, 1999). That reasoning makes no sense within a statutory scheme in which employee consent is the *sine qua non* of compensatory time and in which compensation in cash is the default method of compensating employees for overtime work. Absent an agreement to the contrary, then, an employee's greater power to insist on monetary compensation for *all* overtime includes a lesser power to accrue compensatory time as he or she wishes, even though the employee may someday reach the statutory maximum and then receive monetary compensation for any further overtime work.[6]

[6] The Secretary of Labor's regulations implementing the FLSA permit employers to cash out an employee's accrued compensatory time by paying the monetary equivalent of what the employee would have earned for overtime in the absence of a compensatory time agreement. See 29 C.F.R. 553.27(a); see also 29 C.F.R. 553.26(a). (The FLSA itself does not squarely address that issue, although it does contemplate "cashing out" under at least some circumstances. See 29 U.S.C. 207(o)(3)(B).) The premise underlying that regulation is the same premise that underlies the Secretary's position here: Paying cash for overtime satisfies the general purposes of the FLSA, and compensatory time is the statutory exception to that policy rather than the rule. Certainly nothing in the Act or the regulations suggests that an employer may unilaterally reduce accrued compensatory time *without* paying for it.

Finally, and for similar reasons, it would make little sense to resolve this case by invoking, as the court of appeals did, a "default rule" that "the employer can set workplace rules" as it wishes. Pet. App. 13a. That "default rule" can have no logical application where, by statute, any authority an employer may have to adopt any compensatory time program derives not from the employer's own underlying power to set the terms of employment, but from employee consent. At all events, any uncertainty about the proper disposition of this case should be resolved by reference to the Secretary of Labor's reasonable regulations and interpretive guidance implementing the FLSA, not by judge-made "default rules"—especially default rules that conflict with those policies. See *Auer* v. *Robbins*, 519 U.S. 452, 457, 461-463 (1997); see generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).[7]

[7] Several other exceptions to the FLSA's general overtime provisions are conditioned on the existence of an agreement or understanding between the employer and its employees before work is performed. See 29 U.S.C. 207(g) (piece rates), 207(j) (employment in hospital or similar institution), 207(n) (transit em-

2. Congress's decision to make employee consent a precondition to any compensatory-time policy is sufficient, by itself, to answer the question presented here in favor of the affected employees. Even apart from that consideration, however, other aspects of the statutory scheme independently confirm that Congress intended for employees, in the absence of a contrary agreement, to retain the general right to use or preserve their compensatory time as they choose.

First, Section 207(*o*) is not silent on the subject of an employer's authority with respect to an employee's use of compensatory time. Congress in fact addressed that subject and identified only one circumstance in which an employer may exercise some measure of control: when an employee requests the use of compensatory time, the employer must allow such use within a reasonable period of time except where the use would "unduly disrupt" the employer's operations. 29 U.S.C. 207(*o*)(5). If Congress had intended for employers to exercise unilateral control over the use of compensatory time in other respects as well, it presumably would have so provided. See generally *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The decision below, however, would entitle an employer not only to limit the circumstances in which an employee may choose to use his or her compensatory time, but also to compel the use of compensatory time against the employee's wishes. That construction of Section 207(*o*) would impermissibly "enlarge[] by implication" Section 207(*o*)'s exception to the general rule requiring premium pay for overtime. *Citicorp Indus. Credit, Inc.* v. *Brock*, 483 U.S. 27, 35 (1987); see *Moreau*, 508 U.S. at 33 (applying to Section 207(*o*) the "well-established rule that 'exemptions from the [FLSA] are to be narrowly construed'").

ployees). Neither the Secretary's regulations nor, to our knowledge, the courts have applied to those provisions any "default rule" similar to the one adopted below. See, *e.g.*, 29 C.F.R. 548.200(a), 548.306(f), 548.401, 778.601(c).

Moreover, the court of appeals' approach would eliminate much of the "freedom and flexibility enjoyed by public employees" (see H.R. Rep. No. 331, *supra*, at 20) that Congress enacted Section 207(*o*) to preserve. Congress permitted employees to agree to the provision of compensatory time rather than overtime pay on the premise that they could thereby enjoy otherwise unavailable opportunities to take extended vacations, get away from job stresses when necessary, care for relatives, and attend to other family or personal matters. See *Hearing on the Fair Labor Standards Act Before the Subcomm. on Labor Standards of the House Comm. on Educ. & Labor*, 99th Cong., 1st Sess. 4, 71, 160, 205, 224-225 (1985); *Fair Labor Standards Amendments of 1985: Hearings on S. 1570 Before the Subcomm. on Labor of the Senate Comm. on Labor & Human Resources*, 99th Cong., 1st Sess. 17, 96, 109-110, 275, 311, 321, 374-375, 492-493, 520, 573 (1985).[8] Con-

[8] See also 131 Cong. Rec. 28,987 (1985) (Sen. Kasten) ("This [legislation] will allow workers with erratic work periods more flexibility in meeting their needs."); *id.* at 29,224 (Rep. Martinez) ("[M]any employees * * * have actually come to prefer having comp time instead of overtime pay for those extra hours worked. To them, the extra time to spend on projects that benefit themselves, their homes, their future and their families, are more important than the cash they could earn."); *id.* at 29,225 (Rep. Gilman) ("[This legislation] allows workers the freedom to receive deserved compensation in the manner they prefer while reducing the compliance cost of [*Garcia*] for public employers. Many of the hard-working people employed by our State and local governments

ferring on employers a unilateral right to compel the use of compensatory time when employees would rather *not* use it could significantly impair the value of such time for many employees.

Finally, there is no merit to respondents' argument (Br. in Opp. 5-6, 9) that the policy at issue here is lawful on the theory that, by requiring an employee to use his or her compensatory time, the County is, in essence, simply shortening the employee's work week and cashing out the employee's accrued compensatory time (see note 6, *supra*). Respondents seek to "shorten" each affected employee's "work week" only sporadically and only as a transparent means of forcing the employee to consume accrued compensatory time. However characterized, this is a required-use policy, and it is unlawful because petitioners, without whose consent there would be no compensatory-time program at all, did not consent to the required use of their accrued time. This Court has invalidated similar attempts to elevate form over substance as a means of evading the FLSA's overtime requirements.[9]

value their private time more than the overtime pay they could earn.").

[9] See, *e.g.*, *Walling* v. *Harnischfeger Corp.*, 325 U.S. 427, 430-431 (1945) (overtime pay must be based on a regular rate that takes into account incentive pay); *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945) (overtime pay must be based on a regular rate that takes into account payments resulting from guaranteed piece rates); *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 39-41 (1944) ("split-day plan" under which daily work hours are classified as either "regular" or "overtime" in order to perpetuate the pre-statutory wage scale violates the FLSA); see also 29 C.F.R. Pt. 778, Subpt. F (Pay Plans Which Circumvent the Act); *id.* § 553.224 (state or local government cannot change the length and starting time of work periods in order to evade the FLSA's overtime requirements); 6A Wage &

3. Answering the question presented here in petitioners' favor would impose only a very limited marginal burden on public employers. Because (as all agree) any public employer must bear the burden of securing an employee agreement before providing compensatory time in lieu of overtime pay, the employer is well positioned to seek an agreement that specifies the circumstances under which that employer may properly control the preservation or use of compensatory time. Of course, some employees who agree to the substitution of compensatory time for overtime pay as a general matter may not agree to cede to the employer control over their preservation or use of such time. But in that event a public employer is no worse off than it would be if those employees simply withheld consent to compensatory time altogether, as they are statutorily entitled to do. In the long term, the only respect in which the Secretary's position would disadvantage employers is that their employees will know in advance what to expect if they agree to an employer's compensatory-time program. But full disclosure is a virtue, not a vice, and the consequences of providing it are obviously no basis for resolving the issue presented here in favor of the parties that might benefit from the absence of full disclosure.[10]

Hour Man. (BNA) 99:5254 (Feb. 15, 1991) (although an employer may use compensatory-time provisions in conjunction with a time-off plan within a biweekly pay period, it may not pay a fixed salary for such fluctuating hours); H.R. Rep. No. 331, *supra*, at 22 ("The Committee expects good faith compliance by public employers and would direct the Secretary of Labor to enforce these amendments so as to prevent * * * attempts to evade Congressional intent.").

[10] Petitioners present no claim that the compensatory-time program described in the parties' stipulation violates any independent substantive policy of Section 207(*o*) or of the FLSA in

Even in the near term, the Secretary's position will impose little burden on employers that have already reached agreements with their employees without specifically addressing the question presented here. Where the employment relationship is governed by "applicable provisions of a collective bargaining agreement" or a similar arrangement, see 29 U.S.C. 207(*o*)(2)(A)(i), the employer is free to renegotiate the issue at the expiration of the current agreement (or even during its term if the agreement and applicable law allow).

Where, as in this case, the employment relationship is *not* characterized by collective bargaining with a designated labor representative, see *Moreau*, *supra*, the

---

general, such that the program would be unlawful even if the employees had agreed to it. See generally *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (FLSA rights may not be waived); *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 577-578 (1942) (explaining that one key goal of the FLSA is to reduce unemployment by giving employers an adequate incentive to hire additional workers). Securing an agreement with employees is a necessary, but not always sufficient, condition for the lawfulness of a compensatory-time policy, because such policies must also be consistent with the substantive terms of Section 207(*o*). See 29 C.F.R. 553.23(a)(2); 6A Wage & Hour Man. (BNA) 99:5212, 99:5213-99:5214 (July 29, 1988); Opinion letter from Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), *available in* 1992 WL 845100. A key factor in determining whether a required-use arrangement is substantively consistent with the statutory scheme is whether the arrangement preserves for employees sufficient "flexibility" (H.R. Rep. No. 331, *supra*, at 20) in deciding how to use their compensatory time. See pp. 17-18 and note 8, *supra* (discussing legislative history); see also 52 Fed. Reg. 2016 (1987) (rejecting suggestions "that the scheduling of compensatory time should be solely at the employer's discretion"). We see no reason why the sort of arrangement described in the parties' stipulation could not be administered to afford that flexibility.

employer need only reach an "agreement or understanding" with the affected employee "before the performance of the work." 29 U.S.C. 207(*o*)(2)(A)(ii). By regulation, such an "agreement or understanding" can be quite informal. See 29 C.F.R. 553.23(c). For example, it "may take the form of an express condition of employment," provided that the employee knowingly and voluntarily agrees to it and is informed that his compensatory time "may be preserved, used or cashed out consistent with the provisions" of Section 207(*o*). 29 C.F.R. 553.23(c); accord S. Rep. No. 159, *supra*, at 11 (same); H.R. Rep. No. 331, *supra*, at 20 (same). And an agreement or understanding "may be evidenced by a notice to the employee," so long as the employee registers no objection and his or her decision to acquiesce is free and uncoerced. 29 C.F.R. 553.23(c). Just as those procedures provide simple and informal methods for seeking employee consent to the substitution of compensatory time for overtime pay as a general matter, so too do they provide an equally unburdensome means of seeking employee consent to an employer's proposal to afford the employer some control over the employee's preservation or use of accrued compensatory time.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

JONATHAN E. NUECHTERLEIN
Assistant to the Solicitor General

HENRY L. SOLANO
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor

DECEMBER 1999

16